IN THE

Supreme Court of the United States

October Term, 1941.

No. ——

Maryland and Virginia Milk Producers' Association, Inc., *Petitioner,*

v.

District of Columbia, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS BELOW, JURISDICTION, THE STATEMENT OF THE CASE AND POINTS RELIED ON.

Reference is made to the foregoing petition for the statement of the opinions below, grounds of jurisdiction, statement of the case and points relied on.

ARGUMENT.

POINT ONE. The Association is an agency and not a proprietary Association.

The conclusion to the contrary of the court below, and which is the cause of most, if not all, of the erroneous conclusions complained of is apparently based upon the case of *People* v. *Shoemaker*, 239 N. Y. Sup. 71 (R. 162).

As pointed out by Chief Justice Groner in his dissenting opinion (R. 166) that case is not in point. The point here involved was not involved in that case, as it was agreed in that case by all parties that the cooperative there in question was a proprietary corporation, which bought all milk directly from its members as well as from other producers, received it from the producers, and after commingling sold it for its own account to the distributor, whereas, in the case at bar no such facts or concessions exist—the contrary is shown by the uncontradicted evidence.

The Association here did not buy any milk from its members but as their agent sold it to the distributors. The member-producers delivered it directly to the distributors and authorized in writing, pursuant to their agents' contracts the distributors to pay therefor directly to their *del credere* agent.

Nothing further need be said on this point in addition to the petition than to refer the court to the very able and unanswerable argument on this point of Mr. Chief Justice Groner (R. 166-167), which is adopted as a part of this brief along with the authorities there cited and those cited in the petition.

POINT TWO (a) Congress is without power to impose taxes for the support of the municipal government on property having no situs therein; (b) On intangibles—not the property of the Association.

The Court below based its conclusion that the intangibles constituting the Revolving Fund are taxable by the District on *Wheeling Steel Corporation* v. *Fox,* 298 U. S. 193, 211, upon the theory that the association had established a commercial domicile in the District of Columbia.

That case is not in point because the corporation there, unlike the Association here, was a proprietary corporation; there was no question as to the ownership of the assets involved. In fact, under the law of its incorporation it was turned loose on the world to secure a commercial domicile

at any place and anywhere it could, not contrary to the laws of the place so selected, as it was not required to hold any of its meetings within the limits of the state, which had incorporated it, or to transact any of its business therein, whereas, the Association is a mere agency corporation with no capital and no capital stock, and no *corporate powers* under which it could earn or accumulate property, beyond its operating expense. Under the law of its creation it was compelled to hold all of its general meetings in the state of Maryland, was in a large sense governed by its local units organized in the different states, whose meetings were all required to be held within those states, and none of such units ever met, or were permitted to meet, within the District, even though the Association did maintain an administrative office within the District, but therein was engaged purely in interstate commerce. The statement in the opinion that the Association had a discretion as to *when* it might return to the members the excess brokerage detained from them, and devote it to general corporate purposes is without point when we see that it had no corporate powers or purposes other than to sell the milk at cost including the maintenance of reserves "reasonably calculated as probably to be incurred" and return all excess to the individuals from whom such excess had been withheld. Under the plan adopted this result was attained to the penny.

The question of the power of a state, or any sovereign to tax property depends upon a taxable situs of such property, or of the persons of the owner of such property, within its territorial limits.

The Court below in this ruling seems to have followed its own conclusion in *Neild* v. *District of Columbia*, 71 App. D. C. 306; 110 Fed. (2nd) 246, and *Colgate Palm Olive, etc.* v. *District*, App. D. C. LXVII W. L. R. 242, which involved the power of the Federal Government to impose an excise tax on one transacting business in both interstate and intrastate commerce within the District, based on gross sales of its own property arising within the District, which

is quite distinct from the question here involved and more akin to the still later decisions of this court in *Sweeney* v. *District*, App. D. C. , 113 Fed. (2nd) 25.

The earlier cases on this subject are *Foreign Bond Holders Case*, 15 Wall. 300, 21 L. Ed. 171, 179; *New Orleans* v. *Stemple*, 175 U. S. 309; 44 L. Ed. 175, and *Liverpoole L. & G.* v. *Board of Assessors*, 221 U. S. 346; 55 L. Ed. 767.

The principles derived from those cases upon which the intangibles of a non-domiciled foreign corporation could be taxed may be summarized as follows:

First: An origin in a local business being then conducted within the limits of the State.

Second: That the capital so used was the capital of the foreigner taxed.

Third: That the credit taxed in fact had its origin in intrastate transaction, and was continued therein as a part of the local business being then conducted for permanent and continued use therein in that local business, and was so held as incident to or an instrumentality for the continued operation therein of that localized business.

That the interpretation placed on these leading cases is one long afterwards put on them by this court itself is shown by its opinion in *Farmers L. & T. Co.* v. *Minnesota*, 280 U. S. 204, 74 L. Ed. 371, itself another leading case, saying:

> "New Orleans v. Stempel, 175 U. S. 309; 44 L. Ed. 174; Bristol v. Washington County, 177 U. S. 13, 44 L. Ed. 701; and Liverpool, London and Globe Ins. Co. v. Board of Assessors, 221 U. S. 346, 55 L. Ed. 762, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner, if they have become integral parts of some local business.

Wheeling Steel Corporation v. *Fox*, 298 U. S. 193, 80 L. Ed. 1141 is distinguished in its facts from the case at bar in the following respects at least: All of its corporate activities, intracorporate as well as with third persons were per-

formed outside of its state of origin. The intangibles there taxed were merely accounts receivable and bank deposits incident to business conducted in the taxing state. They were all held by the corporation in its proprietary capacity and not as an agent for others. The State court held that the words there used in imposing the tax only on property "liable for taxation" [the same words used in Sec. 753, of the District Tax Law] did not indicate a purpose to tax intangibles which were primarily subject to taxation in another jurisdiction. This court in reviewing its former decision was careful to point out the basis of those decisions, where at page 211, after citing many of the above cases said:

> "These cases, we said in Farmers Loan and T. Co. v. Minnesota supra (280 U. S. p. 213, 74 L. Ed. 375; 50 S. Ct. 98; 65 A. L. R. 1000) 'recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some *local* business' ".

To hold the intangibles held by the association were taxable to it by the District would violate not only the Fifth Amendment to the Constitution of the United States, but if sought to be sustained by reason of the control of Congress over interstate commerce, under Article 1, Sec. 8, Clause 3 of the Constitution and the power of exclusive legislation for the District, under clause 17 of that Article, it is submitted that such powers must be exercised, subject to the limitations of Sec. 9 of the same Article denying to Congress power to lay a tax or duty on articles exported from any state, or to give by any regulation of commerce or revenue, preference to the ports of one state over another.

While the right of exclusive legislation for the District does exclude the power of any state to legislate for the District it does not empower the Congress in the exercise of this power to do so without regard to the other limitations whether express or implied, arising from the spirit as well as the words of the Constitution, which would be the effect of recognizing in Congress a power in regulating commerce

between the District and states to discriminate against the states, in a manner that neither it nor any state could reciprocate or meet in respect to commerce between it and the District.

Under this construction a producer of milk, or a manufacturer or wholesale merchant doing business in the District of Columbia could be permitted to engage in interstate commerce in all or any of the other states without the imposition of any tax or burden of any kind by a state, whether on property or as an excise tax whereas under *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; 30 L. Ed. 694, and *Asher* v. *Texas*, 128 U. S. 120, 368, no such producer, manufacturer or merchant in such state could be permitted to engage in interstate commerce in the District of Columbia without being subject to both property and excise taxes.

In *Adams Mfg. Co.* v. *Stoven*, 304 U. S. 307, 82 L. Ed. 1365 this court denied the power of the State of Indiana to tax even an Indiana corporation on its sales in either interstate or intrastate business, merely because the two characters of commerce were not distinguished in the taxing act, one of which if intrastate they could tax, and the other if interstate they could not tax.

The exclusive power of legislation for the District, reposed in Congress by the Constitution is not synonymous with an "unrestricted" power of legislation especially in a document, a main purpose of which was to place restriction on legislative and executive powers of both the federal and state governments, and more especially in respect to commerce between states and localities. It is hard for one with information as to the real evils sought to be cured by the Constitution to believe that the framers of that instrument intended by the adoption of Clause 17 of Section 8, Article 1, to annul *quo ad* the District the limitations placed on Congress by Clause 9 of the same article.

POINT THREE. Congress did not intend to impose such taxes on the Revolving Fund.

The principles underlying the question were before this Court in *Cohens* v. *Virginia*, 6 Wheat. 245, 5 L. Ed. 257; *Stoutenburg* v. *Hennick*, 129 U. S. 637; 32 L. Ed. 141; and before the Court of Appeals of the District in *Beistzell* v. *District of Columbia*, 21 App. D. C. 49.

In *Cohens* v. *Virginia*, 6 Wheat. 245, 5 L. Ed. 256, this court said:

> "* * * we find in them no expression which looks beyond the limits of the city. The powers granted are all of them local in their nature, and all of them such as would, in the common course of things, if not necessarily, be exercised within the city. The subject on which Congress was employed when framing this act was a local subject; the formation of a separate body for the management of the internal affairs of the city * * * Congress must have considered itself as delegating to this corporate body powers for these objects, and for these objects *solely*. In delegating these powers, therefore, it seems reasonable to suppose that the mind of the legislature was directed to the city alone, to the action of the being they were creating within the city, and not to any extraterritorial operations. In describing the powers of such a being, no words of limitation need be used. *They are limited by the subject.* But if it be intended to give its act a binding efficacy *beyond the natural limits of its power*, and within the jurisdiction of a *distinct power*, we should expect to find in the language of the incorporating act some words indicating such intention.
>
> Without such words, we cannot suppose that Congress designed to give to the acts of the corporation any other effect, beyond its limits, than attends every act, having the sanction of local law, when anything depends upon it which is to be transacted elsewhere * * *. These revenues are raised by laws whose operation is entirely local, and for objects which are also local; for no person will suppose that the President's house, the Capitol, the Navy Yard, or other public institution was to be benefited * * * or was to form a charge on the city revenue. Coming in aid of the city

revenue they are of the same character with it; the mere creature of a corporate power." (Italics supplied)

In *Beistzell* v. *District of Columbia,* 21 App. D. C. 49, passing on a similar question the Court of Appeals of the District said:

> "The act in question was not intended to regulate, in any sense, the commercial intercourse of the Union. It is purely a local act, and intended to have local operation only. In other words, the particular provision of the statute in question was intended as a regulation of a purely municipal character, and that is made clear, as was said in Stoutenburg v. Hennick, upon the principle of *noscitur a sociis,* if the clause be taken as it should be, in connection with the other clauses and parts of the act relating to licenses. At any rate, it would seem to be reasonable to presume that if it had been the intention of Congress to make the provision of the act apply to soliciting agents *for the owners of goods beyond the district,* that intention would have been expressly declared, and not left to doubtful construction."

And in *Stoutenburg* v. *Hennick,* 129 U. S. 637; 32 L. Ed. 141, this court said:

> "Congress has express power to 'exercise exclusive legislation in all cases whatsoever' over the District of Columbia, thus possessing over the District of Columbia the combined powers of a general and of a state Government in all cases where legislation is possible. But as the repository of the legislative power of the United States congress in creating the District of Columbia 'a body corporate for municipal purposes' *could* only authorize it to exercise *municipal powers; and this is all that Congress attempted to do.*
>
> "The Act of the Legislative Assembly under * * * as stated in its title 'a license on trades, business and professions practiced or carried on in the District of Columbia, and required by Clause 3 of Section 21 among other persons in trade, commercial agents * * * to take out and pay for such license. This provision

was manifestly regarded as a regulation of a purely municipal character, as is perfectly obvious upon the principle of *noscitur a sociis* if the clause be taken as it should be in connection with the other clauses and parts of the Acts. But it is indistinguishable from that held void in Robbins v. Shelby County Taxing District, 120 U. S. 489; 30 L. Ed. 694 and Asher v. Texas, 128 U. S. 120, as being a regulation of interstate commerce.

"It is forcibly argued that it is beyond the power of Congress to pass a law of the character in question *solely for the District of Columbia*, because whether Congress acts upon the subject the regulations it establishes must constitute a system applicable to the whole country; but the disposition of this case calls for no expression of opinion upon that point." (Italics supplied.)

The marked distinction between Acts of Congress local to the District, and those general in their application, was recognized and enforced in *American Security and Trust Company* v. *District*, 50 App. D. C. 231 and 224 U. S. 491; 56 L. Ed. 856, where both courts held that the provisions of Section 250 of the Judicial Code as it then read, giving this court jurisdiction were not applicable to local statutes and spoke of it as a

"well known example of construing a statute not to include a case that indisputably was within its literal meaning, but was believed not to be within the aim of Congress".

POINT FOUR: THE ASSOCIATION WAS NOT CARRYING ON ANY BUSINESS FOR GAIN OR ECONOMIC PROFIT.

The decisions of the court below in this respect are so plainly contrary to the provisions of the law under which it is claimed to be imposed, as to make any further argument on this point unnecessary.

In view of a possible suggestion that because the Association derived a possible profit from the milk it purchased incidentally from others than its members it thereby be-

came a corporation operating for profit and therefore liable to taxation on its gross receipts, what was said by the Federal Board of Tax Appeals in *Eugene Fruit Growers Association* v. *Com'r of Internal Revenue*, 37 B. T. A. 963 is peculiarly applicable here.

The Commissioner there had determined a deficiency in income tax for 1933, based upon the alleged taxability of two items, one of $3,062.28 retained that year out of the so-called "1930 carrot pool" and credited to the building fund reserve, the other item $5,945.10 deductions from the proceeds of other pools which were used for the payment of a 3 per cent dividend on its stock being—unlike the petitioner—a stock cooperative. The Board of Tax Appeals reversing the Commissioner then said:

> "In addition to the processing and marketing of members' products on a non-profit basis, petitioner also conducts 'commercial departments' * * * engaged in other activities * * * a refrigeration plant selling ice and ice cream * * * a machine shop * * * manufacture vinegar, and certain specialities * * *. Besides this, they take over the producers' 'pools' inventories of canned and processed products which have not been disposed of at the end of a reasonable period 'paying' for these items on an estimated fair market basis and thus permitted the more expeditious liquidation of the pools themselves. The products so acquired are disposed of by this department as occasion permits.
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> The last item is by far the largest in dollar volume. It accounts for $102,409.61, out of total gross sales of all the 'commercial departments' of $236,572.42. It may be questioned whether this item is essentially different from the sales made out of the pools themselves * * *. Though referred to as a 'sale' by the pools, the transfer to the 'commercial department' is nothing so imposing since title to the products is in the association from the beginning. The distinction principally one of bookkeeping * * *. Products not so disposed of and taken over to be sold by the 'commercial department' return a payment to the producers immediately, but this is an estimate of what they would have brought had they been sold from the pool, namely, estimated market price less estimated cost of marketing. Only if

these estimates prove erroneous can there be any profit. And this 'profit' even if it results, is not essentially different from the dividends paid out of pool operations. It goes almost entirely to the producer-members in any event, though not as participants in the operation of the pools but as stockholders. This single factor, however, can not be sufficient to condemn petitioner's plan of operation since the payment of dividends up to 8% is expressly permitted by the Revenue Act, and petitioner is not authorized to exceed this figure. *Petitioner's practice appears to be an appropriate method of solving one of its operating problems and we should be reluctant to conclude that it would thereby become disqualified for exemption.*

The Association here does not take title to its members' produce as it did there, has no stock and no means of accumulating capital. It does business as agents for its members only, and that at actual cost. The refunds are to the individuals from whom they were individually retained, and not to the corporate membership *pro tem*. As already stated it paid voluntarily an income tax upon all of these so-called commercial transactions. Concerning such the Board of Tax Appeals said further:

"It seems to us that all of the activities mentioned originated and were continuously maintained as incidents to the association's principal function, cooperative marketing for agricultural producers. They were, according to the uncontroverted evidence, designed—to assist in the efficient performance of that function by facilitating the marketing of products, on the one hand, and by reducing the cost of necessary operations on the other. The encouragement extended to such enterprises by the favorable provisions of the revenue acts would to say the least be anomalous if the sacrifice of efficient operations were to be required in order to attain the statutory exemption. We find no justification for such a construction of the law or of the regulations."

"Looked upon as a whole it seems to us that these 'commercial departments' were purely incidental to petitioner's principal purpose. They were conducted, not for their own sake, but as an adjunct and supple-

> ment to the cooperative marketing of farm products. See Producers' Produce Co. v. Crooks, 2 Fed. Sup. 969, This seems to us to be the test, and not the numerical percentage of petitioner's business attributable to those branches. It may be that the proportion of business done, could be so great that it would be unreal to consider such operations incidental. Hills Mercantile Co., 22 B. T. A. 114. On this point we express no opinion, since in our view no such contention could prevail on the facts before us."

That decision goes far beyond anything that is claimed by the petitioner, or that is necessary to sustain the non-taxable character of the funds involved.

POINT FIVE: Congress did not intend to impose taxes on "Accounts Receivable from Dealers".

The authorities cited under point three, *supra*, would seem to be conclusive on this point.

POINT SIX: CONGRESS WAS WITHOUT POWER TO IMPOSE AN EXCISE TAX FOR THE SUPPORT OF THE MUNICIPAL GOVERNMENT OF THE DISTRICT.

Mr. Justice Groner in his dissenting opinion (R. 167), after citing Section 975, Title 20, D. C. Code, Sup. III in force at the time, as follows:

> "'Provided, however, that the tax imposed by this section shall be payable only upon the gross commissions of any person engaged in the business of a broker or agent, and shall not be payable upon the funds of his principal, of which he is a mere conduit"

continued:

> "in which it is expressly provided that the license tax shall be computed and be payable only, in the case of a broker or agent, upon gross commissions and shall not be taxable or payable upon funds of the principal of which the agent is a mere conduit. Here, if I am correct, the milk never having belonged to petitioner, its

sale by petitioner with the obligation to pay the proceeds to the producer made it a 'mere conduit' as to the sum so transmitted by it.' ".

That the court below erred in using the gross collections as the base for the tax instead of the commissions realized is too obvious to justify further argument on this point.

POINT SEVEN: The District having assessed taxes against the Association for the fiscal years 1936, 1937 and 1938 was without power to alter these assessments after the expiration of the several fiscal years.

It is thought that any discussion of this point additional to that contained in the petition is unnecessary, further than to call attention to the fact that though the "majority opinion" (R. 158) states "We need not consider this question, because it was not raised before the board, but we are free to do so" is inaccurate in that under *Hormell* v. *Helvering*, decided March 17th, 1941, L. Ed. Adv. Ops. 56, required such consideration, and that the intimation implicit in the quotation by the court in its opinion from *Sturgess* v. *Carter*, 114 U. S. 511, 517, 20 L. Ed. 240, that a tax payer had no "vested right in the fruits of his false return", that the existence of the Revolving Fund, its character, or amount was unknown to or concealed from the taxing authorities of the District is not justified inasmuch as the records of this court, and of the court of appeals itself, showed that the question of the taxation of this Revolving Fund, its origin, its purpose and amounts for previous years were well known to the taxing authorities, and was the subject of litigation between the Association and the District. See *Maryland and Virginia Milk Producers' Association* v. *Hazen et als.* No. 6614, 66 App. D. C. 136, 85 Fed. 2nd 302; 200 U. S. 561; 81 L. Ed. 417 in which at the instance of the District the Association filed under oath detailed statements showing its existence and its entire amount, and also to call attention to the fact that though Chief Justice Groner's opinion purports to be a dissent in *part* only—that in the concluding paragraph of his opinion he states:

> "I have not discussed the question whether petitioner's stocks and bonds, comprising its "revolving fund" are taxable, but considering the petitioner is a Maryland corporation and its stocks and bonds were always outside the District of Columbia, and on my theory of the case were the property of the individual member-farmers and not petitioner, I have grave doubts whether any of these securities ever had a taxable situs in the District". (R. 167.)

In view of the cardinal rule of tax construction "that all reasonable doubts as to the construction and intent of tax statutes are to be determined in favor of the tax-payer" we feel justified in saying that Mr. Chief Justice Groner in fact gave his affirmative assent to no important conclusion of the judgment complained of. *Gould* v. *Gould*, 245 U. S. 151, 62 L. Ed. 211; *White* v. *Aronson*, 302 U. S. 16, 82 L. Ed. 20, 23; *Hassitt* v. *Welch*, 303 U. S. 314, 82 L. Ed. 858, 867.

In such case to "seriously doubt is to damn".

POINT EIGHT: THE DISTRICT HAVING ASSESSED THE ASSOCIATION WITH A BUSINESS PRIVILEGE TAX ON ITS RETURNS, WHICH SHOWED ALL THE ESSENTIAL FACTS, WAS WITHOUT POWER TO RE-ASSESS IT WITH FURTHER TAXES AFTER THE EXPIRTION OF THE FISCAL YEAR AND AFTER THE ASSOCIATION HAD REMOVED FROM THE DISTRICT.

The same principles discussed under the preceding point are equally applicable to this point.

It is respectfully submitted that the petition for certiorari should be granted, and on hearing the judgment of the court below should be reversed.

Respectfully submitted,

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